ROBERT CHEAH FOONG CHIEW

v.

LEMBAGA JURUTERA MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING SUMMONS NO: Rl-24-20-2004]
10 JANUARY 2005

ADMINISTRATIVE LAW: *Statutory bodies - Appeal against decision of Lembaga Jurutera Malaysia - Whether applicant seeking public law remedy - Whether appeal must be by way of judicial review or ordinary action for declaration or injunction*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Whether applicant a person adversely affected by decision of public authority where no "decision" has been made - Whether application premature when domestic remedy has not been completed - Applicant must exhaust domestic remedy before coming to court*

CIVIL PROCEDURE: *Judicial review - Application for - Applicant trying to evade leave requirement of O. 53 of Rules of the High Court - Abuse of process in resorting to originating summons procedure in seeking for declarations and injunctions*

The respondent (a statutory body set up by the Registration of Engineers Act 1967 (the Act)) had charged the applicant (a professional engineer registered by the respondent under the Act) under Regulation 25 of Part IV (Code of Professional Conduct) of Registration of Engineers Rules 1972 (the Rules). The charge stated that the applicant had failed to uphold the dignity, standing and reputation of the engineering profession *viz*. by neglecting to administer a certain building contract properly thereby resulting in extensive structural defects. The applicant was said to have thereby contravened r. 25 of the Rules punishable under s. 15(1)(g) of the Act.

The applicant had raised a preliminary objection to the charge. The respondent heard and rejected the preliminary issues raised by the applicant and fixed a hearing date to hear the charge against the applicant. Before the hearing could commence, the applicant served the present Originating Summons on the respondent seeking declaratory and injunctive relief against the respondent on grounds relating to public law, *ie*, breach of natural justice, procedural fairness, *ultra vires* and excess of jurisdiction. The respondent, in response filed a

Summons in Chambers to strike out the applicant's OS claiming that the applicant's OS was an abuse of court process. The respondent claimed that the applicant was seeking relief from the court for his public law rights in relation to the possible public law decision that may be made by the respondent under s. 15(1) of the Act. The respondent submitted that the applicant must therefore proceed by way of judicial review and not by way of an ordinary action. The applicant took the position that he was entitled to bring the action by OS, as O. 53 RHC is not the only remedy available in matters which involved public authorities.

Held (allowing the respondent's application with costs and striking out the OS):

[1] The applicant was seeking a public law remedy. The applicant was seeking the court to ensure that the respondent performed its statutory duties and properly in accordance with statutory powers. Such declaratory and injunctive relief was in relation to public law rights to the possible public law decision that may be made by the respondent under s. 15(1) of the Act. Thus, when a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise. (p. 621 f-g)

[2] The applicant by filing the OS was trying to evade the leave requirement of O. 53 of RHC. On the facts of the case, it was unlikely that leave would be granted to the applicant as the 40 days prescribed in O. 53 r. 3(6) was over and the applicant was not a person adversely affected by the decision of the public authority as firstly there was no "decision" made by the respondent under s. 15(1) of the Act and secondly any interlocutory decision made by the respondent had not adversely affected the applicant. It was an abuse of process for the applicant to resort to the OS procedure in seeking for declarations and injunctions and thereby evade the clear requirements of O. 53 of RHC. (pp. 621 h & 622 a-c)

[3] The respondent had not made any order for cancellation of the registration of the applicant as an engineer under s. 15(1) of the Act. Thus, the applicant's application for injunction would in effect pre-empt or hinder the respondent's right to exercise its statutory duties and powers under s. 15(1) and 15(2) of the Act. It was premature for the applicant to resort to this application when the domestic remedy had not been completed. The plaintiff must exhaust his domestic remedy before coming to the court. (pp. 622 d & 623 c)

Case(s) referred to:
Cheah Foong Chiew v. Lembaga Jurutera Malaysia [1999] 3 CLJ 242 CA ***(refd)***
O'Reily v. Mackmac [1983] 2 AC 237 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***
Yahya Kassim v. Government of Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5, 8
Government Proceedings Act 1948, s. 29
Registration of Engineers Act 1967, ss. 7(a), 15(1)(g), (2), 26
Registration of Engineers Rules 1972, r. 25, reg 25, part IV
Rules of the High Court 1980, O. 53 rr. 1(1), (2), (3), 2(1), (3), 3(6)
Specific Relief Act 1950, s. 54

For the applicant - Firoz Hussein; M/s Puthucheary Firoz & Mai
For the respondent - AL Chu; M/s Azman, Davidson & Co

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif J:
The respondent, Lembaga Jurutera Malaysia, is a statutory body set up by the Registration of Engineers Act 1967 (the Act) to carry out the functions stated under the Act, among others, to ensure professional standards and to control the activities of engineers and to regulate the functions and practices of the engineering profession in Malaysia. The powers of the respondent in carrying out the said functions include the registration and the cancellation of any registered engineers.

The applicant, at all material times is a professional engineer registered by the respondent under the Act.

By an Originating Summons (OS) dated 23 April 2004, the applicant claimed against the respondent, *inter alia*, for the following declarations:

(i) A declaration that the revised charge preferred by the respondent *vide* its letter of 28 February 2001 (revised charge) against the applicant is *ultra vires* the Act and therefore the respondent has acted in excess of its jurisdiction and powers to prefer the revised charge against the applicant;

(ii) Alternatively, a declaration that the revised charge is ambiguous and bad in law;

(iii) A declaration that the decision of the respondent given *vide* its letter of 28 January 2002 (mistakenly dated 28 January 2001) is contrary to

natural justice and/or infringes the applicant's rights under the Federal Constitution to procedural fairness including but not limited to arts. 5 and 8 thereof;

(iv) A declaration that the disciplinary procedures adopted by the respondent in respect of the applicant are contrary to natural justice and/or infringe the applicant's rights under the Federal Constitution to procedural fairness including but not limited to arts. 5 and 8 thereof;

(v) A declaration that the disciplinary procedures adopted by the respondent in respect of the applicant are biased and constitute an infringement of the applicant's rights under arts. 5 and 8 of the Federal Constitution;

(vi) A declaration that the respondent has acted contrary to the rules of natural justice in determining that it had established a *prima facie* case against the applicant without having given the applicant any opportunity to be heard on the matter;

(vii) A declaration that the respondent has acted *ultra vires* the Act and/or in excess of the jurisdiction conferred upon it by the Act in purporting to revise the original charge dated 28 November 1992 *vide* its letter of 28 February 2001;

(viii) A declaration that the revised charge is bad on the grounds of *mala fides* and/or is stale in law;

(ix) An order that the revised charge be set aside; and

(x) An injunction to prohibit the respondent whether by itself or through its servants and agents from commencing or conducting hearings in respect of the revised charge against the applicant.

In response, the respondent filed a summon in chambers (SIC), dated 28 April 2004, to have the applicant's OS struck out on the ground that it is an abuse of the process of the court.

The material facts leading up the applicant's OS and the respondent's SIC are as follows.

The Ministry of Defence, Malaysia (Mindef) had awarded a contract to Sigoh Din Sdn. Bhd., a body corporate of consulting engineers, approved to practice as such under the Act, to construct and complete an ammunition depot in Masjid Tanah, Malacca. The applicant was a director of Sigoh Din Sdn. Bhd. and also the project manager responsible for the supervision of the said project. Due to some complaints lodged by Mindef, the respondent commenced disciplinary proceeding against the applicant.

The applicant was charged under Regulation 25 of Part IV (Code of Professional Conduct) of Registration of Engineering Rules 1972, which were made under s. 26 of the Act. The charge (original charge) reads as follows

> That you, Cheah Foong Chiew, being a Professional Engineer registered under the provisions of the Registration of Engineers Act 1961, and practising as a consultant engineer and whilst being a director of Sigoh Din Sdn. Bhd. between 1969 and 1986 failed to order your conduct so as to uphold the dignity, standing and reputation of the engineering profession *viz* by failing or omitting and/or neglecting to administer a contract for the construction of an ammunition depot project at Masjid Tanah, Malacca on behalf of the Government of Malaysia (Contract No: KP/PEMP/KON/39/80) and to exercise due control in a professional manner over the resident staff of Sigoh Din Sdn. Bhd. in the supervision of the works and thereby resulting in extensive structural defects to the ammunition stores and that you have thereby contravened Rule 25 of the Registration of Engineers Rules 1972 punishable under s. 15(1)(g) of the Registration of Engineers Act 1967 (revised 1987).

Before the disciplinary proceedings could commence, the appellant applied to the High Court by Originating Summons, R2-24-05-1993, seeking a declaration that the alleged contravention of the Registration of Engineers Rule 1972, based on circumstances and facts that took place prior to January 1987, would not enable the disciplinary action to be taken against the appellant under s. 15 of the Act. In addition the appellant also sought a prohibitory injunction to prevent the respondent from investigating against the applicant.

On 18 July 1996, the High Court dismissed the applicant's Originating Summons. The applicant filed an appeal to the Court of Appeal. On 16 March 1999, the Court of Appeal dismissed the applicant's appeal. The applicant then, on 25 May 2000 filed an application for leave to appeal to the Federal Court.

The Federal Court granted the applicant leave to appeal in respect of the following issue:

> Whether an engineer registered under the Registration of Engineers Act 1967 alleged to have committed misconduct to the coming into force of the Registration of Engineers (Amendment) Act 1987 (Act A662) can be charged under Rules 1972 punishable under s. 15(1)(g) of the said 1967 Act as amended by the said Amendment Act of 1987.

However, on the 8 September 2000, the parties agreed to the withdrawal of the applicant's appeal to the Federal Court without any order as to costs. According to the applicant, the withdrawal of the appeal was on the understanding that the respondent would give consideration to withdrawing the charge leveled against the applicant.

The respondent did not withdraw the original charge. Instead on 28 February 2001, the respondent notified the applicant that it was revising the original charge against the applicant. The revised charge reads as follows:

> That you, Cheah Foong Chiew, while a director of Sigoh Din Sdn. Bhd. ("the company") which undertook to supervise the construction of an ammunition deport project at Masjid Tanah, Malacca ("the project") for the Government of Malaysia did between 1981 and 1983 fail to uphold the dignity, standing and reputation of the engineering profession by your failure as the director of the company in charge of the project to exercise control in a professional manner over the company's resident staff engaged in supervising the project and you have thereby contravened Rule 25 of the Registration of Engineers Rules 1972 punishable under s. 15(1)(g) of the Registration of Engineers Act 1967.

The applicant raised a preliminary objection to the revised charge. At the request of the applicant, the respondent agreed to hear the preliminary issues raised by the applicant, namely:

(i) Whether the respondent has the jurisdiction to maintain the revised charged as framed in view of the fact that during the material period, that is between 1981 and 1983, s. 15(1)(g) of the Act did not include r. 25 of the Registration of Engineers Rules 1972, and it was only made part of the sub-section of s. 15(1)(g) by an amendment to the Act in 1987; and

(ii) Whether the respondent has the right to charge the applicant under s. (1)(g) as a director of Sigoh Sdn. Bhd. in view of s. 7(a) of the Act.

The respondent fixed 7 July 2001 for the hearing of the applicant's preliminary objection. However, it was postponed at the request of the applicant as he was medically not fit to attend the hearing. At the suggestion of the applicant, the oral hearing of the preliminary objection was dispensed with, and instead a written submission to be filed by the applicant. Accordingly, the applicant on 25 July 2001, submitted his written submission relating to the preliminary issues.

The respondent gave its decision on 28 January 2002, rejecting the applicant's preliminary objection. The respondent then fixed 13 March 2004, as the hearing date to hear the revised charge against the applicant. The date was later postponed to 7 May 2004.

Before the hearing of the revised charge could commence, the applicant served a copy of this OS on the respondent. The respondent, in response filed this SIC, to struck out the applicant's OS.

The first issue raised by the respondent was that the applicant's OS is an abuse of court process. It was submitted by the respondent that the applicant's declaratory and injunctive relief against the respondent were on the grounds relating to the public law, that is, breach of the natural justice, procedural fairness, *ultra virus* and excess of jurisdiction. According to the respondent, the applicant was seeking relief from this court for his public law rights in relation to the possible public law decision that may be made by the respondent under s. 15(1) of the Act. Thus, according to the respondent, the applicant must, as a general rule, proceed by way of judicial review and not by way of an ordinary action.

The respondent further submitted that it would as a general rule be contrary to public policy and as such an abuse of court process to allow the applicant to evade the provisions of O. 53 for protection of the authorities. In support of its submission, the respondent relied on *O'Reily v. Mackmac* [1983] 2 AC 237 which has been referred to with approval by our Court of Appeal in *Yahya bin Kassim v. Government of Malaysia & Anor* [1998] 1 CLJ 43.

The applicant took the position that he is entitled to bring this action by OS, as O. 53 RHC is not the only remedy available in matters which involved public authorities. According to the applicant, the declarations sought by him concern his right to practice a profession and to earn a livelihood, which is a private right. Being a private right, he is therefore not caught under the principle of *O'Reilley v. Mackman*.

In essence, the first issue before this court is whether it is an abuse of court process for the applicant to use OS procedure instead of judicial review procedure under O. 53 RHC. To address this issue, it is necessary to reproduce the relevant parts of the order:

Scope (Order 53 r. 1)

(1) This order shall govern all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.

(2) This order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Application (O. 53 r. 2)

(1) An application for any of the reliefs specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*), shall be in Form IIIA.

(2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the court shall not confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of s. 29 of the Government Proceedings Act 1948 and s. 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Leave (O. 53 r. 3)

(1) No application under this order shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge, may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

The above O. 53 was the result of an amendment made by the Rules Committee, adopting the inspiration from the amendment to England O. 53. Under the old O. 53, the focus was not on procedure but the type of remedy. But under the present order, it provides one standard procedure by which all action involving public law may be bought and all relevant remedies may be granted by the court.

Order 53 r. 1(1), r. 1(2) and r. 2(1), specifically refer to all-empowering statutory provisions allowing moulding of relief/remedy in the Schedule to the Court of Judicature Act 1964 as well as specific provisions in the Specific Relief Act 1950 relating to relief in form of injunction or *mandamus*. To emphasise its intention for the court to grant any relief/remedy, O. 53 r. 2(3) expressly stated that the court is not confined to the relief claimed by the applicant but may "make any orders". The court *vide* powers under O. 53 to grant any reliefer remedy was strongly affirmed by Gopal Sri Ram JCA in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697.

In the present case the respondent is without doubt empowered by stature to cancel the application's registration as an engineer. Section 15 of the Act states as follows:

> 15. (1) Subject to this section, the Board may order the cancellation of the registration of any Engineer under any of the following circumstances ....
>
> (2) The Board shall not make any order under sub-s. (1) unless:
>
> (a) there has been a hearing at which at least two-thirds of the total numbers of the Board are present, and
>
> (b) an opportunity of being heard either personally or by counsel has been given to the registered Engineer against whom the Board intends to make the order.

What the applicant purported to do in this OS is to call upon the court's jurisdiction to judicially review the Acts and decision of the respondent in the exercise of the respondent's statutory power based on the doctrine of *ultra vires* or excess of jurisdiction. Clearly, the applicant seeks a public law remedy. The applicant is, infact, seeking the court to ensure that the respondent perform its statutory duties and properly in accordance to the statutory powers. Surely, such declaratory and injunction relief is in relation to public law rights to the possible public law decision that may be made by the respondent under s. 15(1) of the Act. Thus, when a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise.

It appears to me, the applicant by filing this OS was trying to evade the leave requirement of O. 53 of RHC. On the facts of this case, it is unlikely that leave would be granted to the applicant as:

(i) Any application relying on respondent's decision relating to original charge in 1992 or the revised charge in 2001 or the decision on jurisdictional issue given *vide* letter dated 28 January 2002 would be filed out of the 40 days prescribed in O. 53 r. 3(6).

(ii) The applicant is not a person adversely affected by the decision of the public authority as firstly there is no "decision" made by the respondent under s. 15(1) of the Act and secondly any interlocutory decision made by the respondent has not adversely affected the applicant.

Thus, in the circumstances of this case, it is my finding that it is an abuse of process for the applicant to resort to this OS procedure in seeking for declarations and injunctions and thereby evade the clear requirements of O. 53 of RHC.

The second ground raised by the respondent is that the application is premature. I am in agreement with the respondent. This is because the respondent has not to date made any order for cancellation of the registration of the applicant as an engineer under s. 15(1) of the Act. Thus, the applicant's application for injunction would be in effect pre-empt or hinder the respondent's right to exercise its statutory duties and powers under s. 15(1) and 15(2) of the Act. It is pertinent to note what Court of Appeal said to the previous court application filed by the applicant in *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242. At p. 245 Shaik Daud Ismail JCA said:

> It is clear from this decision that as a matter of judicial policy, the normal rule is not for the court to intervene but to allow the domestic tribunal to proceed and decide the matter. It is clear that the domestic tribunal can determine its own jurisdiction before the tribunal itself which is capable of making a decision.

At p. 246 the learned judge further said:

> Apart from the respondent's power to decide on their jurisdiction, under s. 20 of the said Act, there is an appeal process, where an appellant can appeal to an Appeal Board chaired by a High Court Judge. We are of the view that the appellant's application to the court, in the circumstances of this case, is premature. We feel that it would be wrong for the Courts to intervene at this stage as it would tantamount to restraining the respondent from hearing the charge against the appellant and would pre-empt the respondent's right under the law to adjudicate the matter. We are of the view that the learned Judge was right when he said it was premature for the Court to injunct the respondent in exercising their powers.

The facts and circumstances of this case have not changed much since the above decision by the Court of Appeal. Except for the submission of preliminary issues for the respondent's decision which the respondent had duly decided, the facts and circumstances are, by large, unchanged. The material fact is that the hearing on the substantive matter has not commenced at all, and as such, no decision of the respondent has been made as to whether an order for cancellation under s. 15 of the Act should be made.

Thus, in the circumstances of this case, I am of the view that the general principle as laid down by the Court of Appeal in particular that the applicant's application to the court was premature, is still applicable till today. It is premature for the applicant to resort to this application when the domestic remedy had not been completed. The plaintiff must exhaust his domestic remedy before coming to this court.

For the above reasons, I therefore, allowed the respondent's SIC with costs resulting the applicant's OS be struck out.